

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )  
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)

*Computer III* Further Remand Proceedings: )  
Bell Operating Company Provision of )  
Enhanced Services; 1998 Biennial )  
Regulatory Review — Review of )  
*Computer III* and ONA Safeguards and )  
Requirements )  
\_\_\_\_\_ )

CC Docket Nos. 95-20, 98-10

**REPLY COMMENTS IN SUPPORT OF  
PETITION FOR DECLARATORY RULING OR WAIVER OF THE OSS SAME ACCESS  
REQUIREMENT**

SBC respectfully submits these Reply Comments regarding its Petition for Declaratory Ruling or Waiver of OSS Same Access Requirement. SBC's Petition merely asked the Wireline Competition Bureau (Bureau) to clarify that a 14-year old holding, which has been effectively repudiated, not stand in the way of its *OI&M Order*.<sup>1</sup> Specifically, SBC requested a declaratory ruling stating that the *Computer III* requirement that BOCs provide ESPs with the "same access" to their OSS as they provide to their own enhanced services operations no longer applies. In the alternative, SBC requested that the Bureau waive this requirement to the extent it applied to ASI employees using ASI OSS in performing OI&M for SBC enhanced services operations.<sup>2</sup>

As laid out in the Petition, the Bureau should expeditiously resolve this matter through a Declaratory Ruling. It can do so by acknowledging that it has already recognized that "same

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<sup>1</sup> See *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, Report and Order and Memorandum Opinion and Order, 19 FCC Rcd. 5102 (2004) ("*OI&M Order*").

<sup>2</sup> As stated in the Petition, SBC welcomes and encourages a clarification by the Commission that ASI is not subject to *Computer III* requirements. Its Petition sought a more limited Declaratory Ruling or Waiver, however, with the hopes of an expedited decision.

access” is not required to meet nondiscrimination obligations and is, therefore, no longer required under *Computer III*. The Commission left open the possibility for that finding when it stated, in the *BOC ONA Amendment Reconsideration Order*, “We...require that until the BOCs can demonstrate that indirect access and direct access to the OSS services...are comparably efficient, the BOCs enhanced services must take the same types of access...as the BOCs provide to other ESPs.”<sup>3</sup> In its section 271 decisions, the Commission has held numerous times that mediated access provided by the BOCs meets the stringent section 251 nondiscrimination requirement. Given those findings and the BOCs’ proven track record of providing nondiscriminatory mediated access, it should be a straightforward matter for the Bureau to now clarify that “same access” is no longer the only way to meet the *Computer III* CEI parameters.

Nevertheless, AT&T and EarthLink, persistent in their efforts to game the regulatory process to obtain a competitive advantage, filed comments opposing both the Declaratory Ruling and the Waiver. As shown below, their arguments are frivolous, irrelevant, or both, and should be readily dismissed.

## **I. EARTHLINK ONCE AGAIN SEEKS REGULATION TO CRIPPLE ITS TRANSPORT PROVIDER WHILE IGNORING THE TRUE MARKET**

EarthLink devotes most of its comments to two arguments that prove nothing. It argues, first, that, notwithstanding SBC’s claims to the contrary, ASI is subject to *Computer III*. It also argues that the BOCs retain bottleneck control over broadband access facilities.

### **A. EarthLink Is Clearly Wrong In Its Contention That ASI Is Subject To *Computer III***

Although SBC noted in a footnote its belief that ASI is not subject to *Computer III* requirements, SBC did not ask the Bureau to base its ruling on such a finding. Instead, seeking as expeditious a ruling as possible, SBC based its petition on narrower grounds that assumed

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<sup>3</sup> *Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 97 ¶4 (1993) (“*BOC ONA Amendment Reconsideration Order*”).

*arguendo* (without conceding) the application of *Computer III* to ASI. EarthLink, nevertheless, focuses heavily in its comments on this issue.

Its arguments are wrong. SBC, in its Petition, explained why ASI is not subject to *Computer III* and will not repeat those arguments here. Suffice it to say that, contrary to EarthLink's claims, *ASCENT* held only that ASI is a successor or assign of the SBC ILECs for purposes of Section 251(c). EarthLink's argument to the contrary is not only inconsistent with that holding, but also ignores the difference between an ILEC and a BOC. Thus, even if *ASCENT* rendered ASI a successor or assign of the SBC *ILECs* for all purposes (which it did not), it did not render ASI a BOC.<sup>4</sup> Because the *Computer III* requirements apply to *BOCs*, not *ILECs*, *ASCENT* could not have subjected ASI to *Computer III*.

Moreover, while SBC, in its 271 filings, may have stated, in an effort to reduce potential disputed issues, that *Computer III* applied to ASI, SBC's statements on these matters are irrelevant. Even if those statements reflected anything other than SBC's desire to avoid any potential controversy, SBC is not the arbiter of the scope of the *Computer III* requirements. It has no authority to make law (as much as it might like such authority). That is left to the Commission and the courts. The fact of the matter is that the *Computer III* requirements apply by their terms to "BOCs," and neither the Commission nor the courts have yet to address head-on, based on a factual record, whether ASI is a BOC.

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<sup>4</sup> EarthLink attempted to prove that ASI is a BOC by poking holes in SBC's interpretation of the definition of BOC found in Section 3(4). But EarthLink's statutory reading of that section, that the phrase "provides telephone exchange service" applies to the original incumbent LEC and not the successor or assign described in Section 3(4)(B) is flatly wrong.<sup>4</sup> Congress would have had no reason to add the words, "that provides wireline telephone exchange service" if it were merely referring to the list of BOCs in Section 3(4)(A) because all of those companies were providers of wireline telephone exchange service. Such language would have been unnecessary. Rather, Congress explicitly limited the term "BOC" to successors or assigns that provide wireline telephone exchange services because it understood that BOCs provide many products and services (i.e. CPE, billing, information services) that should not be subject to BOC regulation merely because a BOC assigns that portion of its business to another entity.

**B. EarthLink's Claims Regarding Competition in the Broadband Market are Wrong and Irrelevant**

Little needs to be said as to the obviously mistaken notion that BOCs (EarthLink erroneously included ASI in this definition of BOC) retain bottleneck control over broadband facilities. It is wrong, as the Commission has recognized, and also irrelevant. It is the cable companies that are the market leaders in the provision of broadband; not the BOCs. As the Commission recently found in its *Broadband Report*, in December of 2003, there were 18,095,131 residential and small business advanced service lines. Of that number, 84.5% were served by coaxial cable while 13.5% were served by ADSL.<sup>5</sup> In addition, wireless carriers are making a greater investment in their networks to allow their customers access to broadband and broadband over power line and satellite are emerging as viable alternatives for customers. Customers have an array of choices in this market – a market where cable is the dominate player.

But even if that were not the case, and BOCs were monopolies retaining bottleneck access to broadband facilities, that would not preclude the Commission from holding that BOCs are not required to provide same access to their OSS for nonaffiliated ESPs in order to meet *Computer III* nondiscrimination obligations. As shown in its petition and, again, below, the Commission has already recognized that the “same access” is not necessary to prevent discrimination and that mediated access is fully consistent with even the strictest nondiscrimination obligation. EarthLink's misconceived arguments about BOC dominance are therefore not only wrong but irrelevant.

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<sup>5</sup> *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, FCC 04-208, Fourth Report to Congress (rel. Sept. 9, 2004) (*Broadband Report*) at Chart 11 p. 33.

## **II. COMMENTERS' ARGUMENTS THAT MEDIATED ACCESS IS NOT THE SAME AS DIRECT ACCESS AND, THEREFORE, IS DISCRIMINATORY, IS A NOTION THAT THE COMMISSION HAS ADDRESSED AND DEBUNKED**

AT&T and EarthLink also argue that anything other than same access would be discriminatory and inconsistent with the purpose of the *Computer III* requirements. The Commission put this notion to rest in its 271 orders. The Commission's recognition that mediated access meets the strict nondiscrimination standard of Section 251 and does not place CLECs at a competitive disadvantage clearly demonstrates that mediated access for nonaffiliates is not *per se* discriminatory. The SBC Petition went into detail (specifically on pages 12 and 13 and in footnote 26) regarding the Commission's review of BOCs' 271 applications, the Commission's holding that Congress intended the nondiscrimination standard in Section 251 to be more stringent than that of Section 202, and the 271 "totality of the circumstances" standard of review, so there is no need to rehash that here. The simple truth is that in the years since the Commission's *Computer III* rules were established, the Commission has ruled repeatedly that mediated access meets strict nondiscrimination obligations.<sup>6</sup> That being the case, no credible claim can be made that the "same access" is necessary to meet the less strict *Computer III* requirements.

EarthLink and AT&T also argue that SBC has failed to demonstrate how the mediated access will be comparably efficient to the direct access ASI will utilize in providing OI&M services to SBC enhanced services operations. EarthLink even goes a step further and states that the SBC Petition "does not attempt to present facts regarding two separate OSS systems that would be essential to evaluate them according to the CEI factors."<sup>7</sup> It continues by stating that

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<sup>6</sup> It should be noted that in its comments on pages 7-8, AT&T asserts that SBC is seeking more than just a waiver of *Computer III* rules, but a waiver of the statutory nondiscrimination obligations. This is a complete fallacy. As stated throughout its petition and these reply comments, with respect to the waiver request, SBC has asked for nothing more than a waiver acknowledging that ASI's direct access to its own systems does not violate *Computer III* rules. AT&T once again missed the point of the petition.

<sup>7</sup> EarthLink Comments at 17.

the systems must undergo a CEI evaluation. But the systems that EarthLink will have access to, post-waiver, and the systems that EarthLink currently has access to are exactly the same. Therefore, EarthLink will experience no difference in the manner in which it interfaces with SBC. And the information that EarthLink seeks with respect to these systems, can be found on the ASI Resource Center, as demonstrated in the Dietz affidavit attached to the SBC Petition. Moreover, if, in granting the requested waiver, the Commission determines that ASI is subject to *Computer III* rules and, therefore, must post a CEI plan with respect to these systems, ASI will post the required CEI plan, which will provide the detail EarthLink describes in its Comments.<sup>8</sup> As is the case with respect to any CEI requirement, EarthLink and others will then be free to challenge that CEI plan in a section 208 complaint. This is the process established by the Commission in its *Computer III Further Remand Proceedings*,<sup>9</sup> not the side-by-side comparison described by EarthLink,<sup>10</sup> and it is the appropriate means for addressing issues regarding compliance with *Computer III*.

### **III. GRANTING THE REQUESTED RELIEF IS IN THE PUBLIC INTEREST**

AT&T argues that SBC's hardship and increased expenses are not enough reason for the Commission to grant a waiver. But the Commission recognized, in the *OI&M Order*, that the costs of continuing the OI&M restrictions outweighed the benefit of waiving those restrictions and, therefore, waived them on that basis.<sup>11</sup> The same holds true here. As SBC demonstrated in its petition,<sup>12</sup> it will cost SBC an additional \$36M to maintain separate operations and systems for the data affiliates, a cost that the Commission assumed would disappear with OI&M relief.

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<sup>8</sup> The ASI Resource Center and posted Terms and Conditions arguably provide as much or more detail than would be required under a CEI plan and EarthLink has access to that information today.

<sup>9</sup> *Computer III Further Remand Proceedings*, Report and Order, 14 FCC Rcd. 4289, ¶15 (1999).

<sup>10</sup> EarthLink Comments at 17.

<sup>11</sup> *OI&M Order* ¶16.

<sup>12</sup> SBC Petition at 8; Declaration of Richard Dietz at 6.

Given this substantial cost, no credible argument can be made (nor has one been made) that a waiver, if necessary, is not appropriate. The Commission itself has repeatedly recognized that the same access is not necessary to protect against discrimination. Indeed other ESPs will continue to have access to the same databases and information they do today, which is essentially the same information ASI employees will access directly while performing OI&M for SBC enhanced services operations.

AT&T further states that “[n]o public interest is served by placing unaffiliated ESPs at a competitive disadvantage so that SBC can reap the full benefit of the efficiencies contemplated in the OI&M order.”<sup>13</sup> But, as noted, ESPs will not be at a competitive disadvantage if ASI is able to use direct access to its own OSS systems in performing OI&M functions for SBC IS. Moreover, the cost savings alone from allowing such shared OI&M are, as the Commission has already found, substantial and demonstrate the public interest in waiving this requirement for ASI. Moreover, as stated above, if ESPs believe the mediated access granted to them is insufficient or places them at a competitive disadvantage, they may avail themselves of the section 208 complaint process. Since ESPs will not be competitively disadvantaged merely because they are not receiving direct access to ASI OSS in all instances, and since SBC will be able to take advantage of substantial cost savings, consumers will eventually be presented with better, more efficient, less costly services, which is clearly in the public’s interest.

But AT&T goes on to state that “SBC cannot show hardship or special circumstance if it can realize these efficiencies simply by using the same mediated access provided to ESPs and others.”<sup>14</sup> Once again AT&T missed the whole point of SBC’s petition. Obviously if SBC could realize the efficiencies of the OI&M order by using the mediated access given to ESPs, there would be no point in filing a petition and seeking clarification regarding direct access. The point of SBC’s Petition is that an employee of ASI performing OI&M for SBCIS already has direct

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<sup>13</sup> AT&T Comments at 6.

<sup>14</sup> *Id.*

access to these systems. To require ASI to establish duplicative systems for mediated access to its own OSS while performing OI&M for SBC enhanced services operations would destroy the very efficiencies that the *OI&M Order* intended to grant and would not allow SBC to fully implement the Commission's *OI&M Order*.

#### IV. CONCLUSION

For the reasons stated above and in the SBC Petition, the Bureau should issue a declaratory ruling that the OSS "same access" requirement has been repealed. Alternatively, the Bureau should waive that requirement so that SBC's enhanced services operations can share OI&M and other services in the same manner as other SBC affiliates, without legal risk.

Respectfully submitted,

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October 19, 2004